

Aylin, Inc., et al (Docket No. RCRA-03-2013-0039)

Jennifer Nearhood

to:

oaljfiling, Sybil Anderson, Jeffrey Leiter

05/21/2014 10:34 AM

Cc:

Janet Sharke, Louis Ramalho, Jennifer Nearhood

Hide Details

From: Jennifer Nearhood/R3/USEPA/US

To: oaljfiling, Sybil Anderson/DC/USEPA/US, Jeffrey Leiter <jll@leitercramer.com>,

Cc: Janet Sharke/R3/USEPA/US, Louis Ramalho/R3/USEPA/US, Jennifer Nearhood/R3/USEPA/US

History: This message has been forwarded.

1 Attachment



Motion to Strike.pdf

Dear Ms. Anderson,

Please find attached for filing an electronic copy of Complainant's Motion to Strike, and supporting Memorandum of Law, in the above captioned matter. Please advise me when you receive this, and if you have any difficulty with the transmission.

Best,

Jennifer Nearhood

Jennifer J. Nearhood

Assistant Regional Counsel (3RC50)

U.S. EPA, Region III

1650 Arch St.

Philadelphia, PA 19103

(215) 814-2649

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Via UPS Overnight and Electronic Mail

May 21, 2014

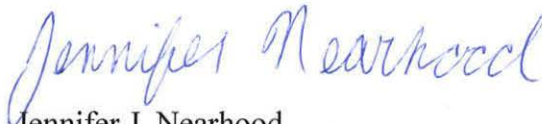
Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington DC 20004-3002

Re: In the Matter of: Aylin, Inc., et al (Docket No. RCRA-03-2013-0039)

Dear Ms. Anderson:

Please find enclosed for filing Complainant's Motion to Strike Respondent Adnan Kiriscioglu's Motion for Partial Accelerated Decision, and supporting Memorandum of Law, in the above-reference matter. If there are any problems with my electronic filing, please let me know. Thank you in advance for your assistance.

Sincerely,



Jennifer J. Nearhood
Assistant Regional Counsel (3RC50)
nearhood.jennifer@epa.gov
215-814-2649

cc: Jeffrey Leiter, Esq.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 3**

In the Matter of:)	Docket No. RCRA-03-2013-0039
)	
Aylin, Inc., Rt. 58 Food Mart, Inc.,)	
Franklin Eagle Mart Corp., and)	
Adnan Kiriscioglu, d/b/a New Jersey)	
Petroleum Organization)	
)	
)	
Respondents.)	
)	
)	

**COMPLAINANT’S MOTION TO STRIKE RESPONDENT ADNAN KIRISCIOGLU’S
MOTION FOR PARTIAL ACCELERATED DECISION**

In accordance with 40 C.F.R. §§ 22.16(b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits*, the Complainant, the Director of the Land and Chemicals Division of the United States Environmental Protection Agency - Region III, hereby submits this Motion to Strike Respondent Adnan Kiriscioglu’s Motion for Partial Accelerated Decision (“Motion”), and Complainant hereby requests this Court to issue an order denying Respondent’s motion to dismiss Respondent from this proceeding and denying Respondent’s request for a hearing on his Motion, and further order Respondent to comply with this Court’s Order dated April 2, 2014 to respond to Complainant’s discovery request granted by this Court on March 11, 2014.


Accompanying this Motion for Discovery is Complainant’s Memorandum of Law in support of its Motion to Strike Respondent Adnan Kiriscioglu Motion for Partial Accelerated Decision.

WHEREFORE, Complainant requests that this Court issue an Order granting Complainant's Motion to Strike including an order granting Complainant's relief requested herein.

Respectfully Submitted,

MAY 19 2014

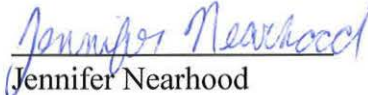
Date



Louis F. Ramalho
Senior Assistant Regional Counsel
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

5/21/14

Date



Jennifer Nearhood
Assistant Regional Counsel
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 3

In the Matter of:)	Docket No. RCRA-03-2013-0039
)	
Aylin, Inc., Rt. 58 Food Mart, Inc.,)	
Franklin Eagle Mart Corp., and)	
Adnan Kiriscioglu, d/b/a New Jersey)	
Petroleum Organization)	
)	
)	
Respondents.)	
)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT’S MOTION TO
STRIKE RESPONDENT ADNAN KIRISCIOGLU’S MOTION FOR PARTIAL
ACCELERATED DECISION**

I. PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of Complainant, the Director of the Land and Chemicals Division of the United States Environmental Protection Agency (EPA or Agency), Region 3, in support of Complainant’s motion to strike Respondent Adnan Kiriscioglu’s (hereinafter “Respondent”) motion for partial accelerated decision (or “MAD”) made pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a).

Complainant believes Respondent makes two alternative arguments in the motion for partial accelerated judgment: a motion for partial accelerated judgment and a motion to dismiss. Respondent discusses both types of motions, and their analogous Federal Rules of Civil Procedure (“FRCP”) provisions, interchangeably throughout the MAD. On page 10, Respondent argues that Mr. Kiriscioglu should be dismissed from the Administrative Complaint both because EPA failed to allege sufficient facts in its Complaint and because there is no genuine issue of

material fact regarding whether Mr. Kiriscioglu is the owner and/or operator of the facilities.

Complainant will therefore treat the MAD as if two separate motions have been pled and filed by Respondent.

II. MOTION FOR ACCELERATED DECISION

Respondent's motion for partial accelerated decision seeks an order from this tribunal establishing and declaring that, as a matter of law, Respondent is not liable to the United States for his failure to comply with a number of regulations governing the operation and maintenance of various underground storage tanks (hereinafter also referred to as "USTs") and their connected piping (hereinafter the term "UST system" will be used to indicate an underground storage tank with its associated equipment, including its connected piping) because the Respondent was not the "owner" or "operator" of the UST systems at the facilities at issue during the periods of non-compliance as alleged in the Administrative Complaint.

Complainant submits that, as will be demonstrated below, there are genuine issues of material fact that exist in this proceeding on the question of liability with respect to Respondent as an "owner" or "operator," and that Complainant sufficiently met its burden under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("CROP"), 40 C.F.R. Part 22, with specific reference to 40 C.F.R. § 22.14. Thus, under established principles of law, Respondent is not entitled to an accelerated decision or summary judgment as a matter of law, and this Court should accordingly issue an order denying Respondent's motion to dismiss Respondent from this proceeding and denying Respondent's request for a hearing on his Motion, and further order

Respondent to comply with this Court's Order dated April 2, 2014 to respond to Complainant's discovery request granted by this Court on March 11, 2014.

A. Standard of Review for Motion for Accelerated Decision

Respondent's motion is being made under authority of 40 C.F.R. § 22.20(a), which provides, in part:

The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

Two inquiries are relevant to this provision: what constitutes a "genuine issue" and what constitutes a "material fact." The Environmental Appeals Board (EAB or Board) has, in the leading case of *In re BWX Technologies, Inc.*, addressed these two issues, and it has explained:

A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. . . . Whether an issue is 'genuine' hinges on whether, in the estimation of a court, a jury, or other factfinder could reasonably find for the nonmoving party. If the evidence is viewed in the light most favorable to the nonmoving party is such that no reasonable decisionmaker could find for the nonmoving party, summary judgment is appropriate. Furthermore, the respective burdens of production of evidence that each party must meet on a motion for summary judgment in order to avoid an adverse decision implicates the substantive evidentiary standard of proof at trial or evidentiary hearing

RCRA (3008) Appeal No. 97-5, 9 E.A.D. 61, 74 (EAB 2000) (footnote omitted) (citations omitted).

This standard is well-established and the EAB has consistently confirmed this. *See, e.g., In re Consumers Scrap Recycling, Inc.*, CAA Appeal No. 02-06/CWA Appeal No. 02-06/RCRA (3008) Appeal No. 02-03/MM Appeal No. 02-01, 11 E.A.D. 269, 285 (EAB 2004). In determining whether a "genuine issue of material fact" does exist, the judge "must consider

whether the quantum and quality [of the] evidence is such that a finder of fact could reasonably find for the party producing the evidence under the applicable standard of proof.” *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993), *aff’d sub nom. Puerto Rico Aqueduct & Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

Accelerated decision (or partial accelerated decision) under 40 C.F.R. § 22.20(a) is comparable to summary judgment (or partial summary judgment) under Rule 56. The Environmental Appeals Board has recognized this. *See, e.g., In re CWM Chemical Services, Inc., Chemical Waste Management, Inc., and Waste Management, Inc.*, TSCA Appeal 93-1, 6 E.A.D. 1, 12 (1995) (“Rule 22.20(a) is comparable to the summary judgment process allowed under Rule 56(c) of the Federal Rules of Civil Procedure.”) Similarly, federal courts have recognized the similarity. *See, e.g., ALM Corporation v. United States Environmental Protection Agency, Region II*, 974 F.2d 380, 382 n.2 (3d Cir. 1992), *cert. denied*, 507 U.S. 972 (1993) (“Accelerated decision in accordance with [40 C.F.R. Part 22] is comparable to a motion for summary judgment or, as in this matter, partial summary judgment.”)

The leading cases on summary judgment in the federal courts are *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Supreme Court in *Celotex Corp.* explained when summary judgment should be granted:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, **after adequate time for discovery** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be ‘no genuine issue of material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.

477 U.S. at 322 (emphasis added). In the case of *American Acryl, N.A., LLC.*, the Chief Administrative Law Judge Biro specifically discussed the burden of proof for a respondent to prevail on a motion for accelerated decision:

For a respondent to prevail on a motion for accelerated decision on liability, it must present "evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it." *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (quoting *BWX Technologies, Inc.*, 9 E.A.D. 61, 76 (EAB 2000)). "Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion." *Rogers Corp.*, 275 F.3d at 1103. Inferences may be drawn from the evidence if they are "reasonably probable." *Id.* Summary judgment is inappropriate where contradictory inferences may be drawn from the evidence or where there are unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact. *Id.*; see also *O'Donnell v. United States*, 891 F.2d 1079, 1082 (3d Cir. 1989). When ruling on a motion for summary judgment it is the court's function to ascertain whether there is a genuine issue for an evidentiary hearing. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1985).

When the movant has met its burden, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." *Id.*; Fed. R. Civ. P. 56(e). Unsupported allegations or affidavits with ultimate or conclusory facts and conclusions of law are insufficient to defeat a properly supported motion for summary judgment. *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216, *reh'g denied*, 762 F.2d 1004 (5th Cir. 1985); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). The non-movant cannot demonstrate a fact issue by resting on the mere allegations of his pleadings. *Galindo*, 754 F.2d at 1216.

Even where it is technically proper to grant a motion for summary judgment, "sound judicial policy and proper exercise of judicial discretion" may permit denial of the motion and full development of the case at hearing. *Roberts v. Browning*, 610 F.2d. 528, 536 (8th Cir. 1979).

American Acryl, N.A., LLC., EPA Docket No. CAA-06-2011-3302, 6–8 (June 2, 2011).

B. Statement of Genuine Issues of Material Facts

- i. Respondent Adnan Kiriscioglu as "owner" of the UST systems at the Franklin Facility.

Both the statute and implementing regulations, Section 9001 of RCRA, 40 C.F.R. Part

280, and 9 VAC 25-580-10¹ provide essentially identical definitions of key words or phrases significant and material to this litigation:

Underground storage tank: any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground

UST system or Tank system: an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

Operator: any person in control of, or having responsibility for, the daily operation of the UST system.

Owner²: In the case of an UST system in use on November 8, 1984, or brought into use after that date, any person who owns an UST system used for the storage, use, or dispensing of regulated substances

Person: an individual, trust, firm, joint stock company, Federal agency, corporation, state, municipality, commission, political subdivision of a state, or any interstate body. 'Person' also includes a consortium, a joint venture, a commercial entity, and the United States Government.

Regulated substance: *** The term 'regulated substance' includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading, and finishing, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

¹Pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. Part 281, Subpart A, the Commonwealth of Virginia was granted final authorization to administer a state UST management program *in lieu* of the Federal underground storage tank management program established under Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991i. The provisions of the Virginia UST management program, through these final authorizations, have become requirements of Subtitle I of RCRA and are, accordingly, enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e. Virginia's authorized UST program regulations are set forth in the Virginia Administrative Code as Underground Storage Tanks: Technical Standards and Corrective Action Requirements ("VA UST Regulations"), 9 VAC § 25-580-10 *et seq.*, (CX 36).

² Respondent's Motion incorrectly recites the definition of "owner" as set forth in 9 VAC 25-580-10.

The Virginia underground storage tank authorized program requires owners of UST systems to register their UST systems on notification forms provided by the Virginia Department of Environmental Quality (“VADEQ”). 9 VAC § 25-580-70. It is an undisputed fact that on June 14, 2005 a notification form was submitted to VADEQ for the UST systems located at the Franklin Eagle Mart facility listing Respondent Adnan Kiriscioglu as the “owner” of such UST systems. (CX 28). EPA’s Administrative Complaint alleges several violations of the Virginia UST authorized program by Respondent at the Franklin Eagle Mart facility, including, but not limited to, Respondent’s failure to respond to EPA’s information request letter issued pursuant to Section 9005 of RCRA, 42 U.S.C. § 6991d(a). Respondent now alleges in his affidavit in support of Respondent’s motion for partial accelerated decision that the June 14, 2005 notification listing Respondent as the “owner” was incorrectly amended by Respondent’s store manager and that Respondent only became aware of the ownership change when EPA produced the document as part of its initial prehearing exchange. However, Respondent knew or should have known on or before April 15, 2013 that the notification form for the Franklin Eagle Mart facility named Respondent Adnan Kiriscioglu as the “owner”. On September 15, 2010, EPA sent Respondent Adnan Kiriscioglu an information request letter, which requested, pursuant to the authority of RCRA 9005, “a copy of the most recent completed Notifications and Certifications for each UST and UST systems at the Franklin Eagle Mart submitted to the State, as required by statute . . . and the regulations 9 VAC 25-580-70 and 9 VAC 25-580-120.” (Complaint’s CX 33). As a result of Respondent’s failure to comply with EPA’s information request letter issued pursuant to Section 9005 of RCRA, EPA alleged in its Administrative Complaint (Count I) Respondent’s failure to comply with EPA’s information collection authority as a violation of RCRA 9005. (Complaint ¶

24, 29, 46, 49 and 50). Respondent in its Answer to EPA's Administrative Complaint admits to receipt of the EPA's information request letter issued pursuant to EPA's authority under Section 9005 of RCRA. (Respondent's Answer ¶ 24). In addition, Respondent admits that "[S]ubsequent to the issuance of the Complaint, the Respondents met with EPA on April 15, 2013, and have since that time submitted the information described in Paragraph 46"³ of EPA's Administrative Complaint. (Respondent's Answer ¶ 47). Therefore, on or before April 15, 2013 during the exchange of information by Respondent with Complainant in response to its authority under Section 9005 of RCRA, Respondent had constructive knowledge that the notification form for the Franklin Eagle Mart facility listed Respondent as the "owner" of the UST systems at such facility.

Respondent has failed to raise his ownership of the UST systems at the Franklin Eagle Mart facility until now to avoid having to produce information sought by Complainant through discovery which has been granted and ordered by this Court from Respondent.⁴ Obviously, Respondent's ownership of the UST systems at the Franklin Eagle Mart is a genuine issue of a material fact which may affect the outcome of this proceeding with respect to the violations alleged in the Complaint against Respondent as "owner." *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). Partial

³ Paragraph 46 of the Administrative Complaint stated that Respondents failed to furnish information concerning the ownership of the UST systems at the facilities in question.

⁴ It is no coincidence that Respondent's Motion was filed on the same day Respondent's responses of Complainant's discovery request as due (May 5, 2014) as granted and ordered by this Court.

accelerated decisions or summary judgment in favor of Respondent is inappropriate in light of the evidence currently in the record. *Id.* Respondent has not met its burden of proof to prevail on a motion for accelerated decision because the facts in support of Respondent's motion are conclusory, and contradictory inferences can be drawn from the evidence in the record. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (quoting *BWX Technologies, Inc.*, 9 E.A.D. 61, 76 (EAB 2000)); *see also O'Donnell v. United States*, 891 F.2d 1079, 1082 (3rd Cir. 1989)). Respondent's motion for partial accelerate decision is a thinly veiled attempt to prevent Complainant from obtaining discovery this Court has ordered in support of Complainant's allegations against Respondent in its Administrative Complaint.

ii. *Respondent Adnan Kiriscioglu as "operator" of the UST systems at the Pure Gas Station, Rt. 58 Food Mart, and Franklin Eagle Mart.*

It is well established that "one or more individuals as well as the corporation may be 'operators' where these individuals have responsibility for the overall operation of the facility." *Zaclon Incorporated et. al.*, EPA docket No. RCRA-05-2004-0019) (April 21, 2006) (citing *Southern Timber Products, Inc.*, 3 E.A.D. 880, 892 (JO 1992)). Factors that have been considered as to whether a person is an "operator" of a facility are his role in the corporation, percent of ownership of stock in the corporation; authority to hire, fire and control employees; degree of presence at the facility; involvement in the activity at issue; authority in making financial decisions for the facility; involvement and authority in decision making as to the facility's operation and compliance with laws and regulations at issue; authority and control over the facility; authority in making decisions as to consultants; delegation of responsibility to others; documents submitted to EPA identifying the individual as facility operator and not just corporate

representative; and personal liability under a lease of the facility. *See Southern Timber Products*, 3 E.A.D. at 894–895 (citing *Wisconsin v. Rollfink*, 33 Env’t Rep. Cas. (BNA) 1507 (Wis., May 23, 1991)); *United States v. Environmental Waste Control Inc.*, 710 F. Supp. 1172 (N.D. Ind. 1989, *aff’d* 917 F.2d 327 (7th Cir. 1990), *cert denied*, 59 U.S.L.W. 3724 (April 22, 1991)). As stated in *Southern Timber* “an officer of a corporate operator should be found to have ‘co-operator’ status where the officer exercises active and pervasive control over the overall operation of the facility.” 3 E.A.D. at 895–96.

Complainant has alleged in its Administrative Complaint that Respondent Adnan Kiriscioglu was the “operator” of the UST systems at the facilities and that Respondent operated such UST systems under the trade name New Jersey Petroleum Organization or “NJPO.” (Complaint ¶ 4, 10). Respondent in its Answer denied that New Jersey Petroleum Organization or “NJPO” (collectively hereinafter “NJPO”) is a corporate entity or that Respondent Kiriscioglu conducted any business under such name. (Answer ¶ 4). Complainant agrees that NJPO is not a corporate entity. Complainant did not plead in its Complaint that NJPO was a corporate entity (Complaint ¶ 4). Complainant plead that NJPO is a trade name Respondent used at all times relevant to the violations alleged in the Complaint. (Complaint ¶ 4). The record shows that Respondent Kiriscioglu used the trade name NJPO⁵ to manage the operation of the USTs systems at the facilities at all times relevant to the violations alleged in the Complaint. (CX 12, EPA 113, 132, 144, 167, 172, 202; CX22; CX23A EPA 461a, 461j, 461mm, 461jj, CX29 EPA 548, 563, 565, 577; CX 34 EPA 754j). Respondent claims in his affidavit in support of his Motion that the

⁵ In legal parlance, Complainant contends that NJPO is an unregistered fictitious name used by Respondent Kiriscioglu to operate the UST systems at the facilities.

name NJPO is merely used as a “moniker” by vendors and third-parties. (Respondent’s Affidavit ¶ 6). However, the record shows that NJPO is more than a “moniker.” Contracts are entered into by and between NJPO and vendors that provide services to NJPO for maintaining, testing, and upgrading the UST systems at the facilities. (CX 12, EPA 113, 132, 144, 167, 172, 202; CX22; CX23A EPA 461a, 461j, 461mm, 461jj, CX29 EPA 548, 563, 565, 577; CX 34 EPA 754j). The record shows that Respondent Kiriscioglu, under the fictitious name NJPO, exercised control over the maintenance and testing of the UST systems at the facilities or maintained the responsibility for the daily operation of the UST systems. (CX 12, EPA 113, 132, 144, 167, 172, 202; CX22; CX23A EPA 461a, 461j, 461mm, 461jj, CX29 EPA 548, 563, 565, 577; CX 34 EPA 754j). Most recently, Respondent Kiriscioglu requested Crossroad Fuels Service, Inc.⁶ to pump out the gasoline and diesel tank at the Route 58 Food Mart including other facilities controlled by Respondent. (Exhibit 1). The record also shows that Respondent Kiriscioglu maintained the responsibility for the daily gasoline inventory records of the Rt. 58 Food Mart Facility. (CX 22, CX 23).

Obviously, Respondent’s operation of the UST systems at the facilities is a genuine issue of a material fact which may affect the outcome of this proceeding with respect to the violations alleged in the Complaint against Respondent as “operator.” *See In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993), *aff’d sub nom. Puerto Rico Aqueduct & Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). Partial accelerated decisions or summary judgment in favor of Respondent is inappropriate in

⁶ Crossroad Fuels Service, Inc. claims that Respondent Adnan is now operating under the name Genesis Petroleum.

light of the evidence currently in the record. *See id.* Respondent has not met its burden of proof to prevail on a motion for accelerated decision because the facts in support of Respondent's motion are conclusory, and contradictory inferences can be drawn from the evidence in the record. *See Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (quoting *BWX Technologies, Inc.*, 9 E.A.D. 61, 76 (EAB 2000)); *see also O'Donnell v. United States*, 891 F.2d 1079, 1082 (3d Cir. 1989)).

Respondent's motion for partial accelerate decision is a thinly veiled attempt to prevent Complainant from obtaining discovery this Court granted and ordered in support of Complainant's allegations against Respondent in its Administrative Complaint as "operator" of the facilities.

IV. MOTION TO DISMISS

Respondent's motion for partial accelerated decision also asks this Court to dismiss all claims against Mr. Kiriscioglu in part "solely on the basis of inadequate pleading by the Complainant." (MAD pg 2). Throughout the MAD, Respondent states that EPA "failed to plead or allege any facts" to support the claim that Mr. Kiriscioglu is an owner or operator of the USTs. (MAD pp 6, 8). So, while Respondent has not submitted a motion to dismiss, EPA will address this line of argument by Respondent.

Respondent overestimates the pleading requirements of the applicable, but not controlling, Supreme Court cases *Iqbal* and *Twombly*. Rather than setting forth all factual allegations required to prove that Mr. Kiriscioglu is an owner or operator, EPA must simply plead factual content sufficient for the court to infer that the defendant is liable for the misconduct in order to meet the low standards of 40 C.F.R. § 22.20(a) and FRCP 12(b)(6).

Respondent is not entitled to dismissal for failure to state a claim, and this Court should accordingly issue an order denying Respondent's motion to dismiss Respondent from this proceeding.

A. Standard of Review for Motion to Dismiss

Under CROP, every complaint must include "a concise statement of the factual basis for each violation alleged." CROP 22.14(a)(3). A respondent may challenge the sufficiency of the complaint as provided in 40 C.F.R. § 22.20(a):

Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

When determining whether the Complainant has established a prima facie case, "all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant." *Mercury Vapor Processing Technologies*, Docket No. RCRA-05-2010-0015, 7 (quoting *Commercial Cartage Co., Inc.*, 5 E.A.D. 112, 117 (EAB 1994)). Once the complaint is taken as true and all reasonable inferences made, the court will determine if a prima facie case exists. *See id.*; *Desarrollos Altamira I, Inc. & Cidra Excavation, S.E.*, EPA Docket No. CWA-02-2009-3462, 4-5 (Oct. 13, 2010).

While the Federal Rules are not applicable to administrative proceedings under CROP, the court may "look to the [FRCP] and related case law as an aid in interpreting the Agency's rules." *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993); *see also Carroll Oil Co.*, 10 E.A.D. 635, 649 n.13 (EAB 2002). A Motion to Dismiss under §22.20 is analogous to a motion to dismiss for failure to state a claim upon which relief may be granted under FRCP 12(b)(6).

Asbestos Specialists, Inc., 4 E.A.D. 819, 827 (EAB 1993); *see also American Acryl, N.A., LLC.*, Docket No. CAA-06-2011-3302, 5 (June 2, 2011).

The general test under FRCP 12(b)(6) is set out by the Supreme Court:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court further explains: “Asking for plausible grounds to infer [an element to be proven] does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the element].” *Twombly*, 550 U.S. at 556. However, “a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555. Legal conclusions, when not back up with factual allegations, are insufficient. *Iqbal*, 556 U.S. at 679.

To determine whether a complaint states a claim, the court first assumes the veracity of the factual allegations in the complaint, then “determine[s] whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679. This standards is analogous to the one set out by the EAB in *Commercial Cartage Co.*. In both instances, the relevant inquiry is whether the facts, taken as true, raise a reasonable expectation that discovery will reveal evidence of the element to be proven. *See Twombly*, 550 U.S. at 556.

B. *Complainant’s prima facie case against Respondent as the “owner” and/or “operator” of the facilities for the violations allege in the Administrative Complaint*

Respondent’s motion argues that EPA’s concise statement of facts was not pled with enough particularity to give Mr. Kiriscioglu fair notice of the claims made against him, or the

grounds upon which they rests. Respondent does not object to the sufficiency of the claims made against the other Respondents Aylin, Inc., Rt. 58 Food Mart, Inc., and Franklin Eagle Mart Corp., despite the fact that EPA pled similar counts against all Respondents.

The Complaint alleges sufficient factual information that, if presumed to be true and all reasonable inferences made in favor of Complainant, this Court can determine that a prima facie case exists given rise to a right of relief against Respondent Kiriscioglu. By way of example, Count II of the Complaint alleges that Respondent Kiriscioglu, as the “owner” or “operator” of the facilities as these terms are defined in 9 VAC § 25-580-10,⁷ failed to provide release detection at the Pure Facility. 9 VAC § 25-580-140 requires that:

Owners and operators of petroleum UST systems must provide release detection for tanks and piping as follows:

1. Tanks. Tanks must be monitored at least every 30 days for releases using one of the methods listed in subsections 4 through 8 of VAC 25-580-160, except [for exceptions not relevant here]

The elements of this violation require a showing that: (1) there is a petroleum UST system; (2) Respondent Kiriscioglu is an owner or operator of the petroleum UST system; (3) the petroleum UST system was not monitored at least every 30 days using a method in 9 VAC § 25-580-160.4-8; and (4) that no exceptions set out in 9 VAC § 25-580-140.1(a)-(c) are applicable.

In the Complaint, EPA alleges that Mr. Kiriscioglu was, at all times relevant to the violations in the Complaint, the “owner” or “operator” of the UST systems at the facility (Complaint ¶ 10); that there is an UST system at the Pure Facility (Complaint ¶ 14); and that

⁷ Paragraph 52 of the Complaint incorporates by reference the preceding paragraphs where Complainant alleged in Paragraph 10 that Respondent Kiriscioglu was the “owner” or “operator” of the facilities as these terms are defined in 9 VAC 25-580-10.

Respondent Kiriscioglu as the “owner” or “operator” selected automatic tank gauging (“ATG”) as the method of tank detection for the UST system at Pure Facility from August 1, 2006 to at least June 2, 2011, in compliance with 9 VAC § 25-580-140 (Complaint ¶ 55), but failed to perform release detection every 30 days as required by 9 VAC 25-580-140.1 from at least August 1, 2006 through May 31, 2011. (Complaint ¶ 58). Respondent Kiriscioglu provided documents of a passing tank tightness test on June 3, 2011 (Complaint ¶ 56), which ended the period of non-compliance for failing to perform release detection every 30 days. (Complaint ¶ 56).

If all of the facts pled above are taken to be true, then EPA has sufficiently pled a prima facie case that Respondent is an owner and/or operator (Complaint ¶10) of a regulated UST system at a facility (Complaint ¶ 14), who failed to perform the release detection required by 9 VAC § 25-580-140 (Complaint ¶ 55, 58). *See Iqbal*, 556 U.S. at 679. If the factual allegations pled in the Complaint—including the location, dates, and specifics of the violation—are presumed to be true, then this Court can determine that a prima facie case exists which gives rise to a right of relief against Respondent Kiriscioglu.⁸ *Id.* In addition, discovery has revealed additional evidence that Respondent Kiriscioglu acted as an “operator” of the UST systems at the facilities. *See supra* section III(B)(ii). Respondent’s motion to dismiss is a thinly veiled attempt to prevent Complainant from obtaining the discovery granted and ordered by this Court in support of Complainant’s allegations against Respondent in its Administrative Complaint as an “operator” of the facilities.


⁸ The factual pleadings in the Complaint, establishing a prima facie case against Respondent as demonstrated above for Count II, are consistent and applicable to all remaining counts against Respondent.

V. CONCLUSION

Complainant request this Court to Rule in favor of Complainant's Motion to Strike Respondent's Motion to Defer Discovery and Motion for Partial Accelerated Decision, and this Court should accordingly issue an order denying Respondent's motion to dismiss Respondent from this proceeding and denying Respondent request for a hearing on his Motion, and further order Respondent to comply with this Court's Order dated April 2, 2014 to respond to Complainant's discovery request granted by this Court on March 11, 2014.

Respectfully Submitted,

MAY 19 2014
Date



Louis F. Ramalho
Senior Assistant Regional Counsel
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

5/21/14
Date



Jennifer Nearhood
Assistant Regional Counsel
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

ATTORNEYS FOR COMPLAINANT

EXHIBIT 1

Adnan

Per your request, Crossroads pumped out the gasoline & diesel tanks at Merv's, Route 58 Food Mart & Holland food Mart.

We removed a total of 1939 gallons of diesel fuel on February 25th & 3982 gallons of gasoline on March 11th & another 1611 gallons of gasoline on March 20th.

We pumped as low as we could pump with our equipment which is 4 to 6 inches in each tank.

To pump any lower, a vacuum truck will have to be used & we do not have one of those.

[REDACTED]

Thanks
Lynn Keffer
Crossroads Fuel Service Inc.

757-482-7051

On February 25th we pumped out the ULSD tanks @ Holland Food Mart & @ Route 58 Food Mart.

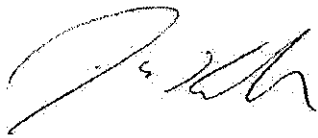
We only pumped them down to about 4" to 6" as we are not a waste oil company & do not have the equipment or license necessary to remove or transport waste product.

On March 11th we pumped out the gasoline tanks @ Route 58 Food Mart & @ Mervs. Again, we only removed the gasoline down to 4" to 6".

On March 20th we pumped out the gasoline tanks @ Holland Food Mart. Again we only pumped the gasoline down to 4" to 6".

We were only interested or able to remove good usable product & only that to recover a portion of the money owed to us for previous deliveries.

Crossroads informed the owners before & after the tanks were pumped, that we could only remove the good product & only down to about 4" to 6" & that in order to remove all the liquid, a licensed waste removal company with a vacuum truck would need to be hired to come in after us.

A handwritten signature in black ink, appearing to be 'J. M. H.', located in the lower-left quadrant of the page.

059496

DATE 2-25 20 14

CROSSROADS FUEL SERVICE, INC.

1441 Fentress Road
Chesapeake, Virginia 23322

(757) 482-2179

SALE # 2889 DATE 02/25/14 12:00:00
COUNTY START 0-0 END 6-0
GROSS DELIVERY 0-0 GALLONS
DIESEL GASOLINE GASOLINE

Genesis Petroleum

MULTIPLE DELIVERIES AT ONE SITE

Dyed diesel fuel, non-taxable use only, penalty for taxable use.

Sold To

Address

RT 59

TRUCK NO.	DRIVER	ORDERED BY	C.O.D.	CHARGE
69	MC			

PRODUCT	GALLONS	PRICE	TOTALS
ULSD clear	723.4	351	2548.89
Pump out Fee			600.00
7 Day Cash Discount			
PAYMENT DUE BY			

Received By:

TAX TOTAL 3148.89

Terms: Payment is due the 10th of the month following delivery. After 30 days a service charge of 2% will be added.

- WINTER CONVENTIONAL GASOLINE
- SUMMER CONVENTIONAL GASOLINE
- WINTER RFG (September 15 - May 15)

RFG Gasoline Certified Under Simple Model Standards

Benzene 1.3 Vol% per Gallon Maximum Not VOC-Controlled
Oxygen 1.5 Wt% per Gallon Minimum Detergent Additized Gasoline
Oxygen 3.5 Wt% per Gallon Maximum

- SUMMER RFG (May 15 - September 15)

RFG Gasoline Certified Under Simple Model Standards

Benzene 1.3 Vol% per Gallon Maximum R.V.P. 7.4 PSI per Gallon
Oxygen 1.5 Wt% per Gallon Minimum Detergent Additized Gasoline
Oxygen 3.5 Wt% per Gallon Maximum
VOC-Controlled for VOC-Control Region 1

059497

DATE 2-25 20 14

CROSSROADS FUEL SERVICE, INC.

1441 Fentress Road
Chesapeake, Virginia 23322

(757) 482-2179

SALE # 2889 DATE 02/25/14 12:00:00
COUNTY START 0-0 END 6-0
GROSS DELIVERY 0-0 GALLONS
DIESEL GASOLINE GASOLINE

MULTIPLE DELIVERIES AT ONE SITE

Genesis Petroleum

Dyed diesel fuel, non-taxable use only, penalty for taxable use.

Sold To

Address

RT 59

TRUCK NO.	DRIVER	ORDERED BY	C.O.D.	CHARGE
69	MC			

PRODUCT	GALLONS	PRICE	TOTALS
ULSD clear	1215.2	351	4265.35
Pump out Fee			600.00
7 Day Cash Discount			
PAYMENT DUE BY			

Received By:

TAX TOTAL 4865.35

Terms: Payment is due the 10th of the month following delivery. After 30 days a service charge of 2% will be added.

- WINTER CONVENTIONAL GASOLINE
- SUMMER CONVENTIONAL GASOLINE
- WINTER RFG (September 15 - May 15)

RFG Gasoline Certified Under Simple Model Standards

Benzene 1.3 Vol% per Gallon Maximum Not VOC-Controlled
Oxygen 1.5 Wt% per Gallon Minimum Detergent Additized Gasoline
Oxygen 3.5 Wt% per Gallon Maximum

- SUMMER RFG (May 15 - September 15)

RFG Gasoline Certified Under Simple Model Standards

Benzene 1.3 Vol% per Gallon Maximum R.V.P. 7.4 PSI per Gallon
Oxygen 1.5 Wt% per Gallon Minimum Detergent Additized Gasoline
Oxygen 3.5 Wt% per Gallon Maximum
VOC-Controlled for VOC-Control Region 1

GASOLINE & DISTILLATES ONLY

GASOLINE & DISTILLATES ONLY

058646

DATE 3-11 2014

CROSSROADS FUEL SERVICE, INC.

1441 Fentress Road
Chesapeake, Virginia 23322
(757) 482-2179

1844
2138

3982

Dyed diesel fuel, non-taxable use only, penalty for taxable use.

From ~~Sold to~~ MURVES

Address

TRUCK NO.	DRIVER	ORDERED BY	C.O.D.	CHARGE

PRODUCT	GALLONS	PRICE	TOTALS
RFG REG	2138		

7 Day Cash Discount

PAYMENT DUE BY

Received By:

TOT.

Terms: Payment is due the 10th of the month following delivery. After 30 days a service charge of 2% will be added.

- WINTER CONVENTIONAL GASOLINE
- SUMMER CONVENTIONAL GASOLINE
- WINTER RFG (September 15 - May 15)

RFG Gasoline Certified Under Simple Model Standards

Benzene 1.3 Vol% per Gallon Maximum Not VOC-Controlled
Oxygen 1.5 Wt% per Gallon Minimum Detergent Additized Gasoline
Oxygen 3.5 Wt% per Gallon Maximum

- SUMMER RFG (May 15 - September 15)

RFG Gasoline Certified Under Simple Model Standards

Benzene 1.3 Vol% per Gallon Maximum R.V.P. 7.4 PSI per Gallon
Oxygen 1.5 Wt% per Gallon Minimum Detergent Additized Gasoline
Oxygen 3.5 Wt% per Gallon Maximum
VOC-Controlled for VOC-Control Region 1

058642

DATE 3-11 2014

CROSSROADS FUEL SERVICE, INC.

1441 Fentress Road
Chesapeake, Virginia 23322
(757) 482-2179

564
50

Dyed diesel fuel, non-taxable use only, penalty for taxable use.

From ~~Sold to~~ ROUTE 58

Address

TRUCK NO.	DRIVER	ORDERED BY	C.O.D.	CHARGE

PRODUCT	GALLONS	PRICE	TOTALS
RFG REG	1944		

7 Day Cash Discount

PAYMENT DUE BY

Received By:

TOT.

Terms: Payment is due the 10th of the month following delivery. After 30 days a service charge of 2% will be added.

- WINTER CONVENTIONAL GASOLINE
- SUMMER CONVENTIONAL GASOLINE
- WINTER RFG (September 15 - May 15)

RFG Gasoline Certified Under Simple Model Standards

Benzene 1.3 Vol% per Gallon Maximum Not VOC-Controlled
Oxygen 1.5 Wt% per Gallon Minimum Detergent Additized Gasoline
Oxygen 3.5 Wt% per Gallon Maximum

- SUMMER RFG (May 15 - September 15)

RFG Gasoline Certified Under Simple Model Standards

Benzene 1.3 Vol% per Gallon Maximum R.V.P. 7.4 PSI per Gallon
Oxygen 1.5 Wt% per Gallon Minimum Detergent Additized Gasoline
Oxygen 3.5 Wt% per Gallon Maximum
VOC-Controlled for VOC-Control Region 1

CERTIFICATE OF SERVICE

I hereby certify that, on the date below, I served the attached Complainant's Motion to Strike Respondent Adnan Kiriscioglu's Motion for Partial Accelerated Decision, and supporting Memorandum of Law, in the manner indicated below to the following addressees:

The original and one copy via UPS overnight and electronic mail:

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington DC 20004

One copy via UPS overnight mail:

The Honorable Christine D. Coughlin
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington DC 20004

One copy via UPS overnight and electronic mail:

Jeffrey L. Leiter, Esq.
Counsel for Respondents
Leiter & Cramer, PLLC
1707 L Street, Ste. 560
Washington, DC 20036

5/21/14
Date


Jennifer J. Nearhood
Assistant Regional Counsel
U.S. EPA, Region III
Office of Regional Counsel (3RC50)
1650 Arch Street
Philadelphia, PA 19103-2029